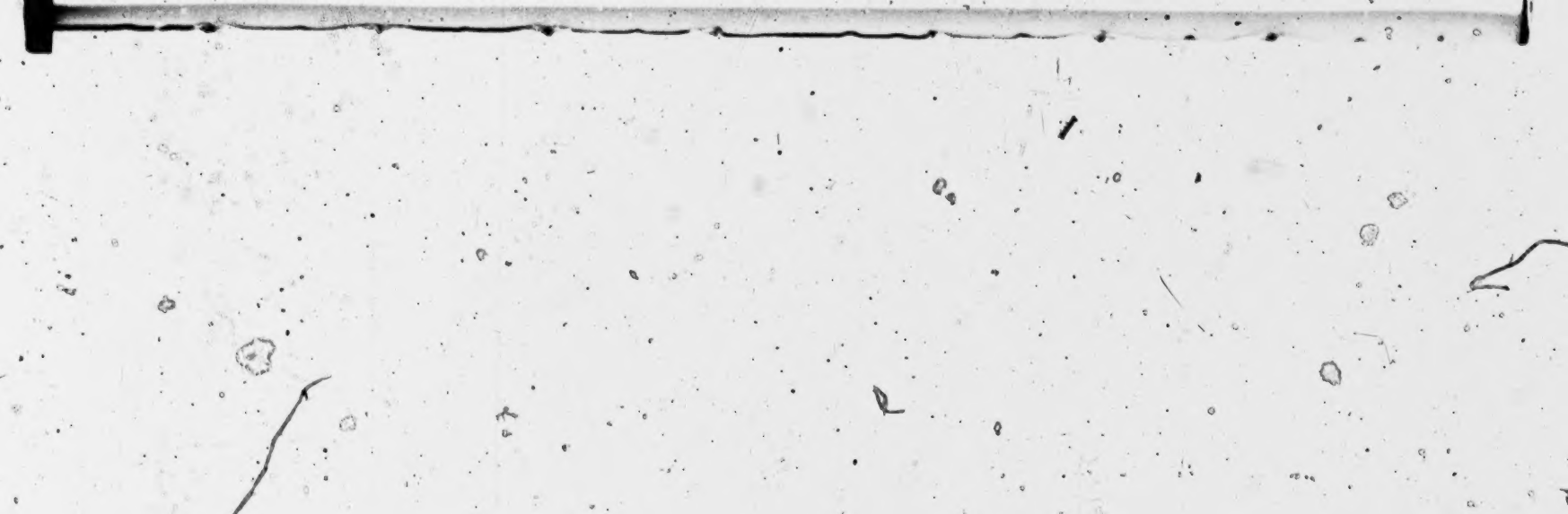


SEP 30 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 12

JIM SKIDMORE ET AL, *Petitioners*

v.

SWIFT & COMPANY, *Respondent*

RESPONDENT'S BRIEF

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INDEX

PART I.	Page
Reply to Petitioners' Brief	1
Opinions Below	1
Statement of Case	1
Summary of Argument	4
Argument	6
I. Under agreed facts, time spent by Petitioners in the firehall does not constitute hours of work, for which they should receive overtime compensation under the Fair Labor Standards Act	6
Discussion of cases cited by Petitioners on hours worked	30
II. Petitioners did not segregate hours clearly non-compensable from hours in legal controversy, and since they fail to meet the burden of proof and the lower courts found against them, such findings must be upheld unless it is clearly erroneous, which it is not under the record	32
III.	
(a) Reply to Petitioners' argument (their Brief 18) on regular rate of pay	34
(b) Under the Fair Labor Standards Act, Petitioners' regular rate of pay is determined by dividing their weekly salaries by the total actual hours worked each week	37
PART II.	
Reply to Wage and Hour Administrator's Brief	40
CONCLUSION	45

TABLE OF CASES

	Pages
Buckner v. Armour & Co. (N. D. Tex.) 53 Fed. Supp. 1022	26
Carlton v. London Mines (D. C. Colo.) 4 L. C. 60699	26
Cordell v. Wilcox (N. D. Okla.) 5 L. C. 60807	25
Fleming v. A. H. Belo Corporation (CCA 5th Cir.) 121 Fed. (2d) 207	33
Jax Beer Co. v. Redfern (CCA 5th) 124 Fed. (2d) 172, 175	33
Johnson v. Dierks Lumber Co. (CCA 8th Cir.) 130 Fed. (2d) 115	31,33
2 Labor Law Service, Par. 23652, Sec. 23676	8
2 Labor Law Service, Par. 32113, P. 32402	9
2 Labor Law Service, Par. 32401, Sec. 32113	19,25
2 Labor Law Service, Sec. 32104	38
Lone Star Gas Co. v. X-Ray Gas Co. (Sup. Ct. Texas) 164 S. W. (2d) 504, 508	10,16,27
Maddox v. Jones, 5 L. C. 60916	8
Missell v. Overnight Transportation Co. (CCA 4th Cir.) 126 Fed. (2d) 98	38
Muldowney v. Seaberg Elevator Co. (D. C.-N. Y.), 4 L. C. 60517, 39 Fed. Supp. 275	26,39,43
Munn v. Southwestern States Co. (N. D. Texas) 5 L. C. 61011	26
Overnight Transportation Co. v. Missell, 316 U. S. 572	35,36,38,39
Perry v. Livermore (TCA) 165 S. W. (2d) 782	25
Skidmore v. Swift & Co., 53 Fed. Supp. 1020; 136 Fed. (2d) 112 (R. 26)	1,26
Skidmore v. Swift & Co. (5th Cir.) 136 Fed. (2d) 112 (R. 62)	1,23

Pages

Tennessee Coal Co. v. Muscoda Local (CCA) 135 Fed. (2d) 320; 321 U. S. 590, 598 ... 8,16,18,19,21,22,24,25

Walling v. American Needlecrafts, Inc., 6 L. C. 61212 ... 8

Walling v. A. H. Belo Corporation, 316 U. S. 624 ... 35

Walling v. Pine (W. D. Okla.) 6 L. C. 61189 ... 25

Wantock et al v. Armour & Co. (CCA) 140 Fed. (2d) 356, 357 ... 29,30

STATUTES

Fair Labor Standards Act, Title 29 U. S. C. A., Sec. 203 (g) and Sec. 207 (a) ... 7

Federal Rules of Civil Procedure, Rule 52, U.S.C.A. following Section 723-C ... 33

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RESPONDENT'S BRIEF

PART I. REPLY TO PETITIONERS' BRIEF.

OPINIONS BELOW

Skidmore v. Swift & Company (U. S. Dist. Ct.), 53 Fed. Supp. 1020 (R. 26).

Skidmore v. Swift & Company (CCA 5th Cir.) 136 Fed. (2d) 112 (R. 62).

STATEMENT OF CASE

Petitioners' statement is inaccurate in the following respects:

On Page 3 of the Petition for Certiorari they say it was stipulated that they worked during the daytime 44 hours per week, later 42 hours, and then 40, as elevator operators and in general fire prevention work. This is incorrect in that the hours fluctuated from week to week. (R. 46, 54).

They say that "In addition to this day work" they spent 3½ to 4 nights per week in the fire hall, with no particular duties to perform except answering alarms, which were very few. They then state, "The stipulation shows that the plaintiffs were paid $27.00 to $29.00 per week for their regular work." (Pet. 3). Respondent feels that this contention is not in accord with the agreed statement of facts because, for the very purpose of preventing such erroneous interpretation, it was distinctly provided in an addendum to the agreed statement of facts, that—

> "Nothing in the agreement is to be construed or argued as an agreement that any part of the wages or salaries paid plaintiffs represented pay for any particular part of their work *or* time spent in the fire hall, these matters being left for the determination of the court." (R. 56).

Respondent believes that the following statement from the agreed record will enable the court to grasp more clearly the essential and undisputed facts:

Petitioners Dennis and Millican were engaged exclusively in general fire hall duties, consisting of keeping in proper condition the plant fire-fighting equipment, such as sprinkler system, hose, extinguishers and barrels. The other Petitioners operated elevators in the plant and acted as relief men for Dennis and Millican in general fire hall duties. (R. 36).

Petitioners were employed under oral agreements whereby, in addition to their daytime work, they agreed and were required to stay in the fire hall or within hailing distance, subject to call in the event of fire or other casualty, but they were not required to perform any specific tasks except in answering

alarms, for which they were paid at first fifty cents and later sixty-four cents for each alarm. (R. 37).

"Plaintiffs (Petitioners) had *no work or duties to perform* during the time they were required to remain in or within hailing distance of the fire hall, except in answering certain fire alarms, as shown in the schedules hereinafter appearing, and had ample time for sleeping." (R. 37).

No actual fires occurred (R. 43, 53). The time required for answering alarms, caused for instance by a rusty plug or leak in the sprinkler system, in which event an alarm automatically sounded, was generally about 15 to 30 minutes, occasionally as much as one hour. (R. 43).

During the two and one-half years involved, one of the men, Millican, answered no alarms whatever; two, an alarm about every three months; one, an alarm once each year and three months; two, only one alarm during the entire two and one-half years; and another, an alarm about once every five months. (R. 31, 32).

They were each paid a weekly salary running from $27.00 to $29.00 per week, and in addition, for answering fire alarms, the sum of fifty cents for each alarm until January 1, 1940, and thereafter sixty-four cents for each alarm. (R. 32).

They worked in the plant as aforesaid from 7:30 A. M. to 3:30 P. M. five days a week, except for a lunch period of thirty minutes each day. At other times they stayed in or close by the fire hall, except that in addition to the lunch period, they had one

hour each morning, two hours each night, two whole days and from 2 to 3½ nights each week for meals, relaxation and entirely private pursuits, being free during these times to come and go as they pleased. (R. 32, Pet. 3).

The brick fire hall maintained by Respondent was equipped with sleeping quarters, steam-heated and air-conditioned rooms, a pool table, domino table and radio for the convenience and recreation of Petitioners, who had ample time for sleeping in the fire hall and occupied their time during the hours they were required to remain there in talking, reading, bathing, dressing, shaving, sleeping, playing pool, dominos, checkers and other games and listening to the radio. (R. 32, 37).

SUMMARY OF ARGUMENT

Petitioners and Respondent entered into an oral contract. Their own interpretation of its terms over a period of years, that time spent in the fire hall did not constitute work, is of controlling weight, provided statute not violated. Recovery not permissible under rule of *Tennessee Coal Co. Case*, 321 U. S. 590, which is only decision by Supreme Court on work hours under Fair Labor Standards Act.

Skidmore Case meets every test applied by majority, concurring, and dissenting opinions in Tennessee Coal Company Case, viz: No indicia of work; no direction, control or supervision of conduct; no exacting and dangerous conditions involving physical and mental exertion; no sub-standard conditions of industry or detriment to health and welfare; fire

hall equipped for convenience and recreation of Petitioners, who had as much time for private pursuits as average citizen; Wage and Hour Administrator's interpretation should be followed; reasonable provisions of contract governing computation of work hours will be upheld; facts leave no uncertainty that time spent in fire hall was not work; what constitutes working time is question of fact; trial court found, affirmed by Circuit Court of Appeals, that time spent in fire hall did not constitute work for which overtime compensation due; concurrent findings of fact of two courts below are final in Supreme Court, absent very exceptional showing of error; affirmance demanded.

Rule of affirmance so strong that Supreme Court in Tennessee Coal Case affirmed findings that travel time constituted work, and that time spent on surface did not, although it is clear that serious question of fact was raised that surface time was just as "required" and "necessary" as travel time.

The Act was not intended to turn into work that which was not work, or not so understood at the time of passage. Courts are not permitted to designate as work some activity which neither employer nor employee ever regarded as work.

Weight of authorities, both Federal and State, is against Petitioners. The courts have been influenced by and have adopted the Administrator's interpretation of the Act.

Injustice would be perpetrated by allowing recovery: Petitioners would obtain no permanent benefit, because present arrangement could not be continued

on account of obvious economic disadvantages; no benefit would accrue to employees generally, because controveries arise only in unusual cases; some industries, notably oil, will receive a serious blow.

Armour & Company's briefs and argument in Armour, v. Wantock, et al, now pending in Supreme Court, applicable on point time spent in fire hall did not constitute working hours. Wantock Case distinguished as to some of facts.

ARGUMENT

I.

Under the agreed facts, Petitioners had daytime jobs as elevator operators, relief men and firemen, and agreed and were required to stay 3½ nights a week in or near their employer's fire hall, during which time they had no work or duties to perform, except answering fire alarms, which were so infrequent and required such little time as to be almost insignificant, and for which they were paid at a lawful rate. They were free to use and did use their time spent in the fire hall for talking, reading, bathing, dressing, shaving, sleeping, playing games, listening to the radio and such purposes as they desired. At all times they had a normal night's sleep, ample time for meals and relaxation, and for entirely private pursuits. Such time, so spent in the fire hall, does not constitute hours of work, for which they should receive overtime compensation under the Fair Labor Standards Act.

Of course, it cannot be even plausibly argued that time so spent constitutes "work," consonant with common acceptance and general understanding of the

meaning of such term. Petitioners' case therefore depends upon a construction of the Fair Labor Standards Act that because they were subject to calls for the performance of trifling tasks, which were so infrequent as to be insignificant, such hours so spent must be considered as "work" hours, for which overtime compensation is due them.

Respondent submits that such construction would be a forced, strained, unreasonable and unjust one, and that the decision of the two courts below, based on fact findings amply supported by the evidence, should be affirmed for the following reasons:

1. Section 7 (a) of the Fair Labor Standards Act (29 U. S. C. A. Sec. 207) provides substantially:

> "No employer shall employ any of his employees * * * for a work-week longer than (44, 42 or 40) hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 3 (g) of the Act (U. S. C. A. Title 29, Section 203). provides:

> "'Employ' includes to suffer or permit to work."

It is obvious that Congress did not define the word "employ," but used it in its generally understood and commonly accepted meaning as related to the term "work," and then stated that it includes suffering or permitting a person to work. That is not a definition, but a mere statement of what the term includes. The statute is clear, definite and

specific. It means that "No employer shall employ a person to work during any one week longer than forty hours, unless such person is paid overtime."

As said in 2 *Labor Law Service*, paragraph 23652, section 23676—"Section 3 (g) by broadening the meaning of employment to include suffering or permitting a person to work, precludes defenses based on alleged voluntary and unauthorized performance of overtime work or gratuitously rendered service, defenses which were raised successfully in the early years of maximum hour regulation," and in *Maddox v. Jones*, 5 L. C. 60916, and *Walling v. American Needlecrafts, Inc.*, 6 L. C. 61212, it was made clear that the purpose of Section 3 (g) was to protect actual employees from being classified as independent contractors.

It is likewise obvious that Congress did not define the terms "work" or "work week," and therefore, what constitutes working time is a question of fact depending upon the particular circumstances and is a matter for determination by the courts. In doubtful cases, the issue must be determined in accordance with common sense and the general concept of work or employment. *Tennessee Coal Co. v Muscoda Local* (CCA) 135 Fed. (2d), 320, syllabi 1, 2; or, as stated by the Supreme Court in affirming the case:

> Congressional intent was "To guarantee their regular or overtime compensation for all *actual* work or employment. Congress here was referring to work or employment, * * as those terms are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pur-

sued necessarily and primarily for the benefit of the employer and his business." 321 U. S. 590, 598.

2. Petitioners were entirely satisfied with the arrangement, because they voluntarily continued it for years. To stress the thought that Petitioners were "required" to stay in the fire hall is to over-emphasize. They stipulate they "agreed" to do so, and the fact that they stayed there for years on end, without complaint, speaks for itself. Moreover, there is no evidence in the record that they could not have voluntarily discontinued staying in the fire hall and still have kept their daytime jobs. A fair inference is that they stayed there because they wanted to do so on account of its various advantages.

The situation may be likened to the one which exists between a private individual and his chauffeur or yardman, who agrees and is required to stay on the premises at night, to assure his being ready for work promptly in the morning or for sense of security or other good reasons. Under similar circumstances, the Wage and Hour Administrator has ruled that where the employee has ample time for meals, relaxation, entirely private pursuits and a normal night's sleep, reasonable periods of time being agreed upon for such activities, such facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours will be accepted (Interpretative Bulletin No. 13, Par. 6, 7; *2 Labor Law Service*, P. 32402, Par. 32113). The Courts have almost invariably followed this ruling, as will be later shown.

The case at bar, where the parties agreed upon reasonable periods of time to stay in the fire hall and reasonable periods for meals, relaxation, private pursuits and sleep, being as much as or more than those enjoyed by the average citizen, comes directly within the scope of the rule announced by the Administrator and adopted by the Courts.

The undisputed facts are that the parties made a mutually agreeable and wholly satisfactory contract, whereby Swift offered Petitioners a pleasant place in which to live and pass their idle hours, far surpassing such surroundings and comforts as they individually might be able to enjoy. The arrangement was under circumstances not more confining than those of the average citizen and within the spirit and purpose of the Act as interpreted by the Wage and Hour Administrator and the great majority of the courts dealing with similar situations. It is submitted that such a contract does not and ought not to be held to violate the provisions of the Fair Labor Standards Act.

3. No question of custom and practice is involved. To the contrary, it was stipulated that the parties had an oral contract. Their own interpretation of its terms over a period of years that time spent in or near the fire hall did not constitute work, is of controlling weight. *Lone Star Gas Co. v. X-Ray Gas Company* (Sup. Ct. Tex., 1942) 164 S. W. (2d) 504, 508.)

4. Swift did not consider that this arrangement which had existed for years involved working hours in violation of the Act. It cannot be conceived that

Swift would otherwise lay itself open to the enormous liability asserted in this case by continuing such an arrangement.

5. Nor did Petitioners consider time spent in the fire hall as working hours, because they accepted their regular weekly salaries for two and one-half years (October 24, 1938 to April 19, 1941) without complaint so far as the record shows. It was not until after this suit was filed, years after the effective date of the Act, that any claim was made for alleged unpaid overtime. Certainly, if Petitioners had any idea that they were actually working, as that term is generally and commonly used and understood, during the time they spent in the fire hall, or that they were working more than the permissible hours under the Act, they would and should have called their employer's attention to it at the time. They did not do this however, which immediately suggests the possibility that their present claims are nothing more than an after-thought.

Petitioners admit in their pleadings filed June 20, 1941, that they were still employed by Swift and still staying in the fire hall. (R. 15). Moreover, they filed another suit in 1943, seeking overtime compensation from April, 1941, to May, 1943, alleging that in 1943 they were still staying in the fire hall under the same arrangement. Evidently they did not consider it a hardship.

This subsequent suit was styled, "*Raymond Roark, et al v. Swift & Company*, U. S. District Court for Northern District of Texas, Civil Action No. 521." The facts were not stipulated, but evidence was of-

fered directly by plaintiffs themselves. Upon trial, the court granted defendant's motion for an instructed verdict, and January 18, 1944, gave peremptory instructions to the jury, which were later reduced to writing and constitute a part of the court record in that cause. Further light is shed on the issue involved here by quotations from such instructions, as follows:

> "Narrowed some, the question is, whether, under the undisputed evidence, the hours spent by plaintiffs at night in sleeping, shaving, or performing like personal duties for themselves, or playing pool, dominoes, or in reading, in defendant's fire hall, constitute hours of work under this law, and must be counted, in arriving at their weekly hours.
>
> "The plaintiffs request the court to submit this one issue, and this one issue really embodies the plaintiffs' view as to what the only issue is. Also what the law is that controls here. The special issue they want submitted to you reads as follows:
>
> 'Now come the plaintiffs and request that the following issues be submitted to the jury:
>
> '1. From the evidence presented, what number of weeks did each of the plaintiffs work for the defendant and how many hours in excess of 40 hours per week did they work during each of these weeks, during the period from April 1, 1941, to June 1, 1943. In making this determination, you shall exclude all hours which you find plaintiffs had for normal sleeping and entirely personal pursuits such as eating, bathing, shaving, etc., but you shall include all time which you find plaintiffs were performing some duty or service for the defendant.

'The jury may make its finding by filling in the following schedule.'

"Now you gentlemen have heard a good deal about the Skidmore case; that there was a case tried in this Court so styled; that the Skidmore case had the same plaintiffs and the same defendant as this one, with the exception that Skidmore is not a party here. They filed that original suit prior to March, 1941, under this statute to recover overtime for a period beginning in 1940 and running into 1941.

"That suit was tried by me under a stipulation as to the facts. The stipulation was not so elaborate. In other words, it did not cover in detail so much as to how plaintiffs' night hours were spent. In substance, the stipulation was, as I view it, the same as the evidence here, as to whether what the men did at night was work. I held against plaintiffs in that case; that the defendant was not liable; that playing dominoes, billiards, reading, sleeping, etc., was not work under this Act and under the circumstances of that particular case. That was appealed to the Circuit Court of Appeals at New Orleans, and they agreed with me about it."

"In that opinion they expressly held that certainly plaintiffs were not entitled to recover overtime pay for sleeping. Now, since this case was filed, plaintiffs have eliminated their claim that they were working while sleeping. Though they originally filed for it, they later voluntarily eliminated that.

"Now were this case submitted to you on the theory submitted by plaintiffs' counsel, I don't see how you could ever reach any conclusion under this evidence that such night hours as plaintiffs spent at the fire hall were in work. Plain-

tiffs' submitted charge would direct you to exclude all hours plaintiffs spent in normal sleeping and entirely personal pursuits, such as eating, bathing, shaving, and so forth. Well, I don't know what 'so forth' could cover, unless it would cover dominoes, reading and pool, because they must be included along with all other personal pursuits. They are purely personal pursuits. Playing pool is no service to Swift & Company. That is purely personal just as much so as sleeping; just as much so as shaving and eating. Personal, because it relates solely to the employee. They may say they could not work for Swift unless they slept some. Nor could they live unless they slept. But the submitted charge would have you include all the night time you found was of service to Swift. Now, I am not able to see, under this evidence, how you could find anything they did was of service to Swift, other than answering those alarms, for which they were paid. Of course, the money they were paid for such calls was infinitesimal because the calls they had were infinitesimal.

"The evidence here shows that the fire hall was quite a nice place of amusement. It wasn't home, but the law holds that you cannot claim wages because you are required to remain away from home. That hall was so attractive that it became almost a Club, where forty to fifty, and I believe one man said sometimes one hundred, men would be up there. Apparently it got so popular that Swift & Company had to stop it. At least I got that from the evidence that they cannot now congregate up there. It is plain from the evidence that it became a very popular Club.

"They do not seek regular pay for that; they want time and a half. Assume they got a dollar.

they want one and a half for those hours they played dominoes and checkers, and I would not be surprised if a little poker once in awhile. Some other court has to hold that. I am not going to make such a holding. Some higher court has to tell me that is the law before I do. I don't believe any of them are going to tell me that.

"I know this, it will be an outrage for a court to set up a system by which men can come in and get thousands and thousands of dollars for nothing. I don't know how much it would be with the sleeping time out, but it would still run into thousands that would be put in their pockets out of Swift & Company's pocket, for their games and pleasure up there at night.

"I hope we will never have such a system of laws prevailing in this country, or become so blind to justice or to common honesty as to look on such things as right."

Since both parties construed the contract as not involving working hours, such construction ordinarily controls. On this phase of the case, the Supreme Court of Texas said in 1942:

"If there is any doubt as to the meaning of a contract like the one before us, the courts may consider the interpretation placed upon it by the parties themselves. In this instance, the acts of the parties themselves indicated the construction they mutually placed upon the contract at the time, including the acts done in its performance, and same is entitled to great if not controlling weight. Courts will generally follow the interpretation of the parties to a doubtful contract. The practical construction placed upon a contract by the parties themselves constitutes the highest evidence of their intention that whatever was

done by them in the performance of the contract was done under its terms as they understood and intended same should be done." (Citing cases and 12 Amer. Jur. p. 787, 249, where many Federal cases decided by the Circuit Court of Appeals and the Supreme Court may be found.) Lone Star Gas Co. v. X-Ray Gas Co. (Sup. Ct. Tex.), 164 S. W. (2d) 504, 508.

6. We are told, however, that—

"Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." (Citing cases).

"This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible. Nor are we concerned here with the effect that custom and contract may have in borderline cases, where the other facts give rise to serious doubts as to whether certain activity or none-activity constitutes work or employment. It is sufficient in this case that the facts relating to underground travel in iron ore mines leave no uncertainty as to its character as work." Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590; Op. 602, 603.

Necessarily this rule must be considered in connection with the further statement of the Court interpreting the Act, that—

"Congress here was referring to work or employment * * * * as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (Opinion, 321 U. S. 598).

Respondent submits that under the above interpretation of the Act, it is clear that time spent in the fire hall by Petitioners should not be counted as hours of work, because:

(a) The friendly and mutually agreeable arrangement in the case at bar does not constitute work or employment, as those terms are commonly used;

(b) Staying in the fire hall was not controlled to any extent or degree by Swift;

(c) Staying in the fire hall was not "required" by Swift in the ordinary sense and meaning of the term "require." Petitioners agreed to stay there, were glad to do it, and the record fails to show that they could not have voluntarily stopped if they so desired. In other words, the record fails to show that staying in the fire hall was a necessary complement to retaining their daytime jobs.

(d) Staying in the fire hall was not pursued necessarily and primarily for the benefit of Swift. It was a favor extended and a favor received.

(e) The provision of the contract indisputably shown by the construction placed upon it by the parties, that time spent in the fire hall did not constitute working hours, was reasonable.

(f) This is not a borderline case, but if it were, then certainly the facts give rise to serious doubts as to whether time spent in the fire hall under the particular arrangement in this case, constituted work or employment.

(g) Such doubts are resolved by the construction of the parties, the interpretation of sim-

ilar contracts by the Wage and Hour Administrator, the adoption by the courts of such interpretation, the decisions of the courts, the intent and purpose of the Fair Labor Standards Act, the common sense construction demanded, and by due regard of what is fair not only to the employee, but also the employer. Finally, they are resolved by the fact findings of the trial court, affirmed by the Circuit Court of Appeals.

7. The Skidmore case meets every test applied by the majority opinion, the two concurring opinions and the dissenting opinion in *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, towit:

Majority Opinion

(a) The District Court found that travel time "bears in a substantial degree every indicia of work-time; supervision by the employer, physical and mental exertion, activity necessary to be performed for the employer's benefit, and conditions peculiar to the occupation of mining." (321 U. S. 593). The Circuit Court affirmed these findings of fact. None of these indicia exists in the *Skidmore case*, and the District Court so found. Its findings were affirmed by the Circuit Court of Appeals.

(b) The question in the *Tennessee Coal Case* was said to be whether the miners were at work while engaged in underground travel, which they were obliged to perform *under the direction* of the Company. (Opinion 593). The opinion then twice stresses the point of direct control and supervision by the employer, saying:

"The operation of the skips and man trips is under the *strict control and supervision* of the Petitioners at all times; loading and unloading are *supervised;* speed of trips *regulated;* conduct of miners *prescribed.*" (Op. 595).

"This compulsory travel * * * is at all times under * * *strict control and supervision.*" (Op. 598).

In the Skidmore Case, time spent in the fire hall was not under Swift's direction, control or supervision. Swift could make no demands and did not attempt to do so.

(c) The exacting and dangerous conditions from and to the portal, involving continuous physical and mental exertion as well as hazards to life and limb in the Coal Case, did not exist in the Skidmore case.

(d) Travel was not primarily undertaken for the convenience of the miners in the Coal Case (Op. 599), whereas, in the Skidmore case it appears that "The fire hall building was equipped with sleeping quarters, etc., *for the convenience and recreation* of its occupants." (R. 37).

(e) In the Coal Case, the Supreme Court adopted the conclusion of the Administrator of the Wage and Hour Division, that underground travel in mines is work. (Op. 600). The conclusions of the Administrator (paragraphs 6 and 7 of Interpretative Bulletin No. 13, found in *2 Labor Law Service*, Sec. 32113, pp. 32401 et seq.) that time spent by employees of similar nature to time spent in the fire hall by Petitioners, does not constitute working hours, should therefore be adopted. The Administrator's interpretation is as follows:

"6. In a few occupations periods of inactivity need not be considered as hours worked, even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i. e., the frequency with which the employee is called upon to engage in work.

"In these cases, the nature of the employee's work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc.

"7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty, but are subject to call at any time in the event of an emergency.

"The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day.

"In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division."

(f) In the *Coal Case*, the Supreme Court said that reasonable provisions of contracts governing the computation of work hours, would be upheld. (Op. 603.) In the *Skidmore case*, the construction of the contract by the parties thereto that time spent in the fire hall did not constitute work hours, is reasonable.

(g) In the *Coal Case*, the Supreme Court said that the facts relating to travel time leave no uncertainty as to their character as work. (Op. 603). In the *Skidmore Case*, the facts leave no uncertainty that time spent in the fire hall was not work.

First Concurring Opinion

The term "work week" has no technical meaning. As used in the Act, it carries merely the meaning of common understanding. In controverted cases, the facts are to be found by a jury or court. Where the record shows a judgment of the District Court, affirmed by the Circuit Court of Appeals, based on findings with ample evidence to support them, "affirmance by this court is therefore demanded." (321 U. S., Op. 604).

Second Concurring Opinion

"A seasoned and wise rule of this court makes concurrent findings of two courts below final here, in the absence of very exceptional showing of error." (321 U. S., Op. 605).

Dissenting Opinion

This opinion in the Coal case is to the effect that the trial court failed to find sufficient relevant and material facts to support the final finding that travel time should be considered as hours worked. In addition, the dissenting opinion points out that "The Act was not intended to turn into work that which was not work, or not so understood at the time of its passage. Courts are not permitted to designate as work some activity of an employee which neither employer nor employee had ever regarded as work, merely because the court thought that he ought to be compensated." (321 U. S. 617).

8. What constitutes working time is a question of fact. (*Tennessee Coal Co. v. Muscoda Local* (CCA) 135 Fed. (2d), 320, 322; 321 U. S. 590, 598).

It was stipulated in the Skidmore case that—

> "Petitioners agreed to remain in the fire hall and stay at or within hailing distance subject to call in the event of fire or other casualty, *but were not required to perform any specific tasks during these periods of time, except in answering alarms.*" (R. 37). *They were not required to perform any work, and had no duties whatever except in the aforesaid emergency calls.*" (R. 42, 51).

> "During the entire period of time involved herein, plaintiffs (Petitioners) *had no work or duties to perform* during the time they were required to remain in or within hailing distance of the fire hall, except in answering certain fire alarms, as shown in the schedules hereinafter appearing, and had ample time for sleeping." (R. 37).

The trial court's findings of fact were as follows:

Petitioners *had no work or duties to perform* during the time they were required to remain in or within hailing distance of the fire hall, except in answering fire alarms, which were infrequent and usually required only 15 to 30 minutes time of one or two men to answer. (R. 31).

Petitioners were paid weekly salaries, and in addition they were paid for answering fire alarms the sum of fifty cents for each alarm until January 1, 1940, and thereafter sixty-four cents for each alarm. (R. 32).

The time Petitioners spent in the fire hall subject to call to answer fire alarms, does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the courts. (R. 33).

The Circuit Court of Appeals affirmed the trial court's findings. (*Skidmore v. Swift & Co.* (CCA) 136 Fed. (2d), 112).

The findings of the two courts below that time spent in the fire hall does not constitute hours worked are not clearly erroneous. To the contrary, they are based on the Administrator's interpretation of the Act, the authority of other decisions, state and fed-

eral, in similar cases, on common sense and reason, and accord the Act a construction which is just and fair to both employer and employee under the entire facts and circumstances of the case. The judgment should, therefore, be affirmed.

Concurrent findings of the two courts below are final in the absence of a very exceptional showing of error. Affirmance is demanded. (*Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, Op. 598; concurring opinions, 604, 605).

9. In the Coal Case, it is clear that the findings of the Circuit Court of Appeals and the Supreme Court that time spent on the surface by the miners was just as "required" and "necessary" for their work as travel time, or at least, that a serious question of fact was raised, viz:

> "*Time was consumed* each week by the employees in checking in and obtaining and returning lamps, carbide and tools on the surface—(opinion Circuit Court 135 Fed. 2d, 320, bottom 321)—the workers were "*required* to deposit a metal disc at the tally house when arriving for work and pick it up again at the end of the shaft." (P. 323).

> "The miners arriving on Company property went to the tally house, checked in and hung up individual brass checks on a tally or check-in board. This was *for the benefit of the officials of the employer* to tell at a glance who had reported for work, etc., in order to enable the Company to fill vacancies and issue *necessary* instructions to the head miners and crews. Each miner rents a lamp for the day and buys a can of carbide for underground illumination purposes

(clearly necessary for the work). Many stop at the tool house to pick up supplies and tools '*necessary* for their work.' They were then *required* to report to the loading platform and *await* their turn to ride down the shafts. (Tennessee Coal Co. Case, 321 U. S. 590, Op. 594).

The two courts below found travel time to be working time, but the Circuit Court excluded from the work week the time spent in activities at the surface. In this state of the record, the Supreme Court accepted the findings that travel time constituted work, and that time spent on the surface did not constitute work, and affirmed the case. Such action demonstrates the strength of the rule governing affirmance by the Supreme Court of fact findings in the lower courts. Consistency demands affirmance of the Skidmore case.

10. Not only has the Administrator of the Wage and Hour Division interpreted the Act to the effect that time claimed by Petitioners does not constitute working hours (Interpretative Bulletin No. 13, paragraphs 6 and 7, *2 Labor Law Service*, Sec. 32113, pages 32401, et seq.), but in practically all instances the trial and appellate courts, both Federal and State, have expressly relied upon and adopted this interpretation. Some of these cases are as follows:

The Oil Pumper Cases—

Cordell v. Wilcox (USDC Okla.) *5 Labor Cases 60807.*

Walling v. Pine (USDC WD Okla.) *6 Labor Cases 61189,*

Perry v. Livermore (TCA) 165 S.W. (2d), 782.

A telephone operator with telephone exchange in home, required to provide uninterrupted service 24

hours per day. *Munn v. Southwestern States Co.* (USDC ND Tex.) *5 Labor Cases 61011.*

A weighmaster for a metal mine required to be present when trucks passed night or day, in order that he might weigh them. *Carlton v. London Mines* (USDC Colo.) *4 Labor Cases 60699.*

A porter who did odd jobs in the plant during the daytime and agreed and was required to sleep at the premises at night. The fact that he had a home and stayed in it at various times was held not to be material. *Muldowney v. Seabery Elevator Co.* (USDC N. Y.) *4 Labor Cases 60517.*

The Firemen Cases—

Buckner v. Armour & Co., 53 Fed. Supp. 1022.

Skidmore v. Swift & Co., 53 Fed. Supp. 1020; affirmed 136 Fed. (2d) 112.

11. Shocking injustice would be perpetrated by allowing a recovery in this case. The court has perhaps already noted, or will note from reading the cited cases, how often the various courts have remarked on the exorbitant and unconscionable amounts demanded through claims for overtime alleged to be due under a sought interpretation of the Fair Labor Standards Act strictly and liberally in favor of the employee, although contracts and conditions of employment have been entered into innocently and in good faith, and the employees have worked under them during long periods of time, with no thought or suggestion of complaint or presenting claims for overtime. In other words, what they were doing simply did not come within their own common sense understanding of the term "work." Attention is again call-

ed to the rule that Petitioners' construction of the contract is entitled to great, if not controlling weight, and will generally be followed by the courts. *Lone Star Gas Co. v. X-Ray Gas Co.* (Sup. Ct. Tex.) 164 S. W. (2d) 504.

The situation is aggravated when it is realized that in many instances reliance has been placed by the employer on the interpretation given the Act by the Administrator of the Wage and Hour Division, and the approval by the courts of his interpretation.

In the case at bar, if petitioners prayers are granted, most of them would receive a tidy fortune of around $12,000.00 to $13,000.00 (plus attorney's fees), which, averaged with the pay they have already received, would give them salaries amounting to approximately five times the amounts they contracted to take for what they did. Specifically, they would receive about $625.00 per month for acting as elevator operators, relief men and firemen for approximately eight hours a day, five days a week, and sleeping in the fire hall 3½ nights a week under the circumstances shown.

The cost to Respondent of the claims of all Petitioners during the period of time involved, would amount to a total sum of $82,000.00. Subsequent liability to the date the matter is decided by the Supreme Court would involve a large sum. Multiply these sums by the number of plants Swift has in the United States, where similar systems are in effect, and the result is a staggering amount.

Take Petitioner Millican's case for example. He was paid a straight weekly salary of $28.50. He inspected firefighting equipment and kept it in good

condition for approximately eight hours a day, five days a week. He slept at the fire hall 3½ nights a week. At all times he had a normal night's sleep and ample time for meals, relaxation and entirely private pursuits, as much as or more than the average citizen. *He never answered a single alarm during the entire period of 2½ years for which he claims overtime compensation.*

Should he be paid $13,000.00, in addition to the $1,500.00 he received annually? If so, he would receive a total sum of $7,500.00 a year, instead of the $1,500.00 a year he agreed to take for what he did. He would thus be remunerated at the rate of about $625.00 per month.

If the court decides that Millican is not entitled to recover this exorbitant amount on the facts, then the other cases fall on both the facts and the principle thereby established.

12. Except for financial recovery for present liability, Petitioners cannot benefit by reversal because it is obvious that economic disadvantages incident to the present arrangement would prohibit its continuation.

13. No lasting benefit from a reversal would accrue to employees generally, because the conditions giving rise to controversy are unusual ones, such as are found in the oil industry, logging camps, etc. The oil industry will suffer a crippling blow if it has to pay its pumpers and leasemen the overtime rates demanded by such a decision. The result would be not only unfortunate, but wholly uncalled for, because it will be observed from reading the decisions that

in the oil pumper cases, as well as others cited, and in the Skidmore case, the employees in each and every instance had ample time for normal sleeping and attending to their private affairs, under arrangements which were practical, mutually satisfactory and advantageous to both parties. Moreover, no sub-standard conditions of industry or detriment to health and welfare exist.

14. In *Armour & Company v. Wantock et al*, now pending in the Supreme Court, the briefs and argument of Armour & Company on the point that time spent in the fire hall did not constitute working hours, are particularly applicable to the Skidmore Case.

15. However, the Wantock Case may be distinguished from the Skidmore Case as follows: The stipulation and oral testimony in the Wantock Case, in several places use the terms "work," "work shift," etc. In the beginning of the opinion by the Circuit Court of Appeals, 140 Fed. (2d) 356, it is stated that plaintiffs "were employed during one period on a 48-hour work shift." There is no such language in the Skidmore Case. To the contrary, in the Skidmore Case, Petitioners "*had no work or duties to perform*" during the time they stayed in or near the fire fire hall, except in answering certain fire alarms, and had ample time for sleeping. (R. 37). No hardships, substandard conditions or detriment to health and welfare of the employee were involved. The employee enjoyed as much or more freedom of activity as the average citizen.

Other facts distinguishing the Wantock Case are pointed out in Respondent Wantock's Brief in the

Circuit Court of Appeals, (page 15) and in the Opinion of the Circuit Court of Appeals in *Wantock et al v. Armour & Company*, 140 Fed (2d) 356, 357.

Discussion of Cases Cited by Petitioners On Hours Worked

Several cases are cited in the Petition for Writ of Certiorari, pp. 17 to 25, and in Petitioners' Brief, pp. 12, 13, as tending to support their point that time spent in or near the fire hall should be counted as hours of work. These decisions deal with night watchmen, policemen, messengers and others involving waiting time, subject to call time, and time traveling to work. The trial court correctly disposed of four of them (the only ones cited in the trial brief), by saying of course, it is often true that such time should be treated as work, but that such cases do not control here. (R. 28, 29). The ground of distinguishment is that they were different on the facts. All of the remaining cases cited by Petitioners, with one possible exception, fall in the same category, and it would be useless to discuss them in detail.

Respondent does not contest these holdings nor the Administrator's interpretation that in the case of messengers, chauffeurs and others, waiting time and other periods of inactivity should be considered hours worked. (Pet. 23). Petitioners' Argument (Pet. 8) that the decision of the court below exempts from the coverage of the Act a great body of employees such as night watchmen, maintenance men, firemen, etc., who have periods of inactivity and waiting, has therefore no force whatever, because it has absolutely no fact foundation.

Fleming v. Rex, 43 Fed. Supp. 950, is cited by Petitioners who assert, on page 14 of their Brief, that in *Fleming v. Rex*, "there was present the question of the hours devoted by the employee to sleeping, and the Court held that so long as an employee was charged with the responsibility of the operation of the pumps, that he was 'working' within the meaning of the Act." Such conclusion is wholly unjustified, as will be apparent from the Opinion which fails to reveal even a suggestion that sleeping time was involved in the decision.

This leaves *Johnson v. Dierks Lumber Co.*, (CCA 8th Cir.) 130 Fed. (2d) 115. The apparently favorable excerpt from this Opinion set forth in the Petition (P. 35), may be sound as an abstract proposition but it is not applicable here where the material facts are wholly different. Moreover, it is indicated in the majority opinion and clearly held in the concurring opinion of Chief Justice Stone that the hours spent by plaintiffs sleeping at night must be specifically excluded from hours of work, and should not be considered as overtime.

Johnson v. Dierks may be distinguished from the case at bar on the following grounds:

1. There was direct testimony in the record that plaintiffs worked sixteen hours a day regularly and twenty-four hours a day on Sundays and holidays. Their employment was considered in two parts, (1) hours of manual labor (2) hours when their sole duty was to act as watchmen to prevent vandalism, etc. The higher court held this evidence could not be disregarded.

2. Obviously, such positive duties requiring active mental and physical exertion were far different in character from those involved in the Skidmore Case.

3. During the day, from seven or eight o'clock in the morning until three in the afternoon, some of plaintiffs in the Johnson-Dierks Case were at liberty, but were required to be present all the remaining hours of the day and night. Since the case was reversed and remanded, it is not clear whether this free time would be excluded as hours of work.

4. Johnson v. Dierks is not in harmony with the interpretation placed on the Act by the Administrator, and the decisions rendered by various courts, particularly in the oil pumper and other cases cited herein.

II.

Petitioners are not entitled to recover overtime compensation for sleeping, dressing, bathing or similar personal affairs, and they failed in their proof to segregate such time from nonsleeping, pool, domino and radio-playing time, the burden of which was on them. Since they failed to meet such burden of proof and the trial court found against them, such finding must be upheld unless it is clearly erroneous, which it is not under the facts and circumstances of this case.

All of the decided cases on facts similar to those in the case at bar hold that Petitioners are not entitled to recover overtime compensation for sleeping, and while engaged in entirely personal affairs. (See cases cited this brief, pp. 25 and 26, see also opinion of Circuit Court of Appeals, R. top p. 64).

The Circuit Court of Appeals in this case pointed out that plaintiffs failed to segregate sleeping time and gave this failure to sustain the burden of proof as another reason for affirming the judgment. The court said, "Even if the plaintiffs had been entitled to recover for hours spent in boredom or waiting for bedtime or an alarm, the proof wholly fails to prove the actual hours spent either in sleeping, playing pool, dominoes, or radio, dressing, shaving, bathing, or in any of said enterprises, the burden of which was on the plaintiffs." (R. 64).

In an action for unpaid compensation and liquidated damages brought under the Fair Labor Standards Act of 1938, the burden is upon the plaintiff to establish by a preponderance of the evidence that overtime claimed actually constituted hours of work or labor, and the evidence to sustain this burden must be definite and certain. *Johnson v. Dierks Lumber & Coal Co.*, (C. C. A. 8th Cir.) 130 Fed. (2d) 115, 118, citing: *Jax Beer Co. v. Redfern*, 5 Cir., 124 Fed. (2d) 172, 175. *Cf. Carrol v. Green*, 92 U. S. 509, 513; *Stockwell v. United States*, 80 U. S. 531, 542; *United States v. Chamberlin*, 219 U. S. 250, 262; *Gale v. Union Bag & Paper Corp.*, (5th Cir.) 116 F. (2d) 27, 28.

In the case at bar, Petitioners wholly failed to meet such burden of proof, and the court having found against them, such finding must be upheld, unless it is clearly erroneous, which it is not under the facts and circumstances of this case. *Fleming v. A. H. Belo Corporation* (CCA 5th Cir.) 121 Fed. (2d), 207, opinion p. 210, citing *Federal Rules of Civil Procedure*, Rule 52, U. S. C. A. following Section 723 (c).

Respondent submits that this point is sound and should be sustained.

III.

A

Reply to Petitioners' Argument (Brief, 18) On Regular Rate of Pay

Respondent insists that time spent in the fire hall by Petitioners was not work, under the state of the record, but if this court should reach a contrary conclusion, then Respondent submits that the regular rate of pay should be calculated by dividing the weekly wage by the total number of hours actually worked.

Petitioners claim as hours of work, not only time spent as elevator operators, relief men and firemen, but also time in the fire hall. Nevertheless, they here advance the novel idea that "the regular rate of pay" on which overtime shall be based ought to be computed by *excluding* time in the fire hall, and *including only* time as elevator operators, relief men or firemen. They then divide the weekly salary by the hours so fixed as working hours in order to arrive at the "regular rate of pay."

In other words, they want *all* their salary allocated to only a *part* of their alleged work, and this part divided into the salary in order to calculate the "regular rate of pay," and they want this rate then to be applied to *all* of the hours claimed as work. Their evident purpose, of course, is to recover all that the court might allow them by the wildest stretch of the

imagination. They say they can have their cake and eat it too.

In support of this theory, Petitioners cite *Walling v. A. H. Belo Corporation*, 316 U. S. 624, and then say, "There is no disagreement between the rule laid down by the court in the Belo case, and that laid down the same day by the Supreme Court in *Overnight Transportation Co. v. Missell*, 316 U. S. 572." (Pet. 28).

Respondent is unable to follow this line of argument. There is neither agreement nor disagreement in the two rules, because they cover two different, separate, and distinct factual situations. The Supreme Court in the Belo Case specifically distinguished the Missell Case, and in discussing the guaranty contract used in the Belo Case, said:

> "It specifies a basic hourly rate of pay, and not less than one and one-half that rate for every hour of overtime worked beyond the maximum hours fixed by the Act. *It is entirely unlike the Missell case decided this day.* In the contract in that case, there is no stated hourly wage and no provision for overtime." (See opinion *Walling v. Belo Corporation*, 316 U. S. 624, 634).

The written wage contract in the Belo Case provided for a basic rate of 67 cents per hour for the first 44 hours each week, and not less than one and one-half times such basic rate for overtime, with a guaranty of a minimum of $40.00 per week. The court held that this agreed rate of 67 cents per hour was the "regular rate of pay."

In the Missell Case, there was an oral contract for a fixed weekly wage and fluctuating hours of work,

with no express agreement for overtime compensation. So, the Supreme Court held that the "regular rate of pay" is the quotient of the weekly wage divided by the total number of hours worked, and then stated:

> "*This contract differs from the one in Walling v. Belo Corporation*, post page 624, where the contract specified an hourly rate, and not less than time and one-half for overtime, with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty, where the hours worked at the contract rate exceeded that sum." (316 U. S. 572, Op. 581).

Petitioners cite two other cases in support of their theory on the "regular rate of pay"—*Sklar Oil Corporation v. Thompson* (CCA 8th Cir.) 126 Fed. (2d) 872, and *Bumpus v. Continental Baking Co.* (CCA 6th Cir.), 124 Fed. (2d) 549. They are not in point, because the contract was for an hourly rate of pay in both instances. In the Sklar case, the court said that it was shown conclusively that the employee was being paid at an hourly rate and not a flat salary. Bumpus v. Continental Baking Company was cited by the Supreme Court in *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, opinion 580, as being one of the decisions supporting its holding in the Missell case, that the regular rate of pay is determined by dividing the fixed weekly wage by the total number of hours actually worked. The court said:

> "This method of computation has been approved by each Circuit Court of Appeals which has considered such problems." (Op. 580, citing

Bumpus v. Continental Baking Co., 124 Fed. (2d) 549-552).

It therefore appears that the authorities cited by Petitioners are not in point, and fail to support their contention that although hours spent in the fire hall should be counted as hours of work, yet they must not be considered in arriving at the regular rate of pay.

But if they are so considered, it is undisputed that Petitioners were employed by Respondent at a fixed weekly salary to perform their work as elevator operators, relief men and firemen, and they also agreed to remain in the fire hall or within hailing distance subject to call in the event of fire or other casualty. Under these facts, Petitioners got a certain weekly wage for their work, whatever it was.

Respondent therefore insists that if all time spent in the fire hall is held to be time worked, then the weekly salary was for the entire amount of such time, and this is the only construction of the contract of employment that can reasonably be adopted.

B.

Petitioners worked for fixed weekly salaries and a fluctuating number of hours each week, under contracts of employment containing no express or implied agreement regarding the basis on which overtime compensation, if any, should be paid. Under the Fair Labor Standards Act, their regular rate of pay is determined by dividing their weekly salaries by the total actual hours worked each week.

It has always been the contention and ruling of the Administrator that if the employee is on a weekly

salary basis for either a regular or fluctuating number of hours, his regular hourly rate of pay on which time and a half must be paid is computed by dividing the salary by the regular number of hours worked, or if no regular number of hours are worked, by the total number of hours worked each week. Administrator's Interpretative Bulletin No. 4, Paragraphs 10 to 12, incl., W. & H. Questions and Answers No. 9, Release No. R-198, Feb. 27, 1939 (*2 Labor Law Service*, Sect. 32104).

The whole subject is exhaustively discussed by the Circuit Court of Appeals, Fourth Circuit, in *Missell v. Overnight Transportation Co.* (CCA, 4th Cir.), 126 Fed. (2d) 98, opinion, pages 106 to 110, inclusive. It seems to Respondent that the matter is set at rest by the decision of the Supreme Court in the *Missell Case*, 316 U. S. 572.

There the court held that where the contract merely provided for a weekly wage with variable or fluctuating hours, the regular rate of pay is determined by dividing the weekly wage by the number of hours worked during the work week. The court said:

> "Apart from the Act if there is a fixed weekly wage regardless of the length of the work-week, the longer the hours the less are the earnings per hour. This method of computation has been approved by each Circuit Court of Appeals which has considered such problems. See Warren Bradshaw Drilling Co. v. Hall, 124 F. 2d 42, 44 (5 Labor Cases 60821); Bumpus v. Continental Baking Co., 124 Fed. 2d 549, 552 (5 Labor Cases 60,816), cf. Carleton Screw Products Co. v. Fleming, 126 F. 2d 537, 541 (5 Labor Cases 60,991). It is this quotient which is the 'regular

rate at which an employee is employed under contracts of the types described and applied in this paragraph for fixed weekly compensation for hours, certain or variable." (316 U. S. 572, 580).

Finally, it must be remembered that the Supreme Court in the Missell Case affirmed the opinion of the Circuit Court of Appeals, 126 Fed. (2d) 98, and on page 110 of that opinion, the Circuit Court presents a specific example of the proper method of calculating the regular rate of pay. The court supposes a salary of $30.00 for a work week of 50 hours, which would make the regular rate of pay $30.00 divided by 50, or sixty cents (60c) per hour. Thus the employee's total earnings for the week would be $33.00, computed as follows:

40 hours at 60c per hour (straight time)	$24.00
10 hours at 90c per hours (time and one-half)	9.00
Total	$33.00

The court then said that the following week the employee's total earnings would be similarly computed, and so on each week.

PART II. REPLY TO WAGE AND HOUR ADMINISTRATOR'S BRIEF.

Page 8 of the able brief of the Administrator explains his position as follows:

The problems presented by many inquiries with respect to the applicability of the Act to periods of inactivity or idleness required a practical flexible interpretation, consistent with the ordinary meaning of work, rather than a rigid "either-or" rule, which would either entirely include or entirely exclude all inactive duty. He made an effort to provide such a practical guide through Interpretative Bulletin No. 13 issued in May, 1939, unchanged since as to paragraphs pertinent here.

He refers to paragraphs 6 and 7 of the Bulletin as covering two different situations, but asserts that the facts of the Skidmore case do not fall clearly within either (pp. 9 and 10).

He wisely adopts a flexible interpretation by conceding that time spent by Petitioners while eating and sleeping does not constitute employment compensable under the Act. (First Proposition, Brief p. 6). He then perhaps inadvertently applies the "either-or" rule to the rest of the time spent by Petitioners in the fire hall while shaving, dressing, bathing, playing games and engaging in other strictly personal activities which they would pursue, whether in the fire hall or at home. The test is applied exclusively to time spent in the fire hall, rather than to the employees' entire time for a week or month, which is the true test under the principles and spiri

of the Bulletin on which employers, employees and courts have long relied. In this, it is submitted that the Administrator fell into error for these reasons:

Respondent agrees with the Administrator that the Skidmore case is not analogous to the second situation mentioned on page 9 of the Administrator's brief, where the employee has periods of inactivity for varying lengths of time between intermittent periods of active duties; exemplified by messenger boys, chauffeurs, employees waiting for materials to be furnished or waiting for loading or unloading of railroad cars, etc. Such cases as *M. K. & T. R. R. Co. v. United States*, 231 U. S. 112; *Walling v. Allied Messenger Service, Inc.* (S. D. N. Y.) 47 Fed. Supp. 773; *Travis v. Ray* (W. D. Ky.) 41 Fed. Supp. 6, and others of like import, cited by the Administrator and Petitioners, are not in point. Respondent does not contest these holdings nor the Administrator's interpretation in these instances. As said by the trial court, it is often true that waiting time, subject-to-call time, travel time, etc., should be treated as work, but such cases do not control here. (R. 28-29).

Respondent submits, however, that the Skidmore case falls either within the bounds of the first situation stated on page 9 of the Administrator's brief, where the employee stays on employer's premises under the circumstances shown, or it falls within the general rules laid down by the Administrator in 1939.

Paragraph 6 of Bulletin 13, attached to the Administrator's brief, states that in a few occupations, periods of inactivity need not be considered as hours

worked, even though the employee is subject to call. It is said the answer depends on many things, some of which are * * * degree to which the employee is free to engage in personal activities—number of consecutive hours employee is subject to call without performing active work, i. e., frequency with which he engages in work—his opportunity for uninterrupted sleep, conducting personal business affairs, carying on a normal routine of living, etc. An example is given of the employee of a small telephone exchange operating a switchboard in her house.

Paragraph 7 of the Bulletin deals with employees engaged in active work part of the day, but required to be on call 24 hours a day, such as oil well pumpers, caretakers, custodians, watchmen of lumber camps, etc. Here it was said that the fact that the employee lives on the premises does not mean he is working 24 hours a day. The *reason* for this conclusion was stated to be that "In the ordinary course of events, the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases, the employee may be free to come and go during certain periods." It was further stated that no precise formula will solve the situation, and that the Administrator would accept reasonable standards agreed upon, between the employer and employee.

It cannot be assumed that these paragraphs of the Bulletin could cover *all cases*, nor that any particular case must meet *all* requirements of the rules. It follows that a particular case must be decided ac-

cording to the broad intent and purpose of the rules, and that common-sense construction is demanded.

The position cannot be taken that since Petitioners stayed in the fire hall at times when they might otherwise have been at home, they were working, because it is too narrow. The test should be applied by taking their time for a week or month and inquiring—did they do about the same character of things in the fire hall that they would have done at home? Were they frequently required to perform active work? Did they have ample opportunity for uninterrupted sleep, ample time for their meals and conducting their personal affairs, and as much time as the average citizen for relaxation, entirely private pursuits, going to the movies, etc.?

Paragraph 7 of the Bulletin illustrates the point. There, pumpers, caretakers, custodians and watchmen were not considered as working twenty-four hours a day, *because* they had ample time for sleeping and eating, relaxation and entirely private pursuits, being free to come and go during certain periods. Petitioners had the same opportunities — probably more; certainly no less. Living on the premises, although the employee had a home of his own, is not controlling. *Muldowney v. Seaberg Elevator Co.* (E. D. N. Y.) 39 Fed. Supp. 275, middle right-hand column, page 282.

It therefore follows that this case must be governed by the same broad, general purpose and intent of the Administrator's rules as were applied to oil pumpers, caretakers, custodians or watchmen of lumber camps.

Otherwise, utter confusion would exist among employers attempting to comply with the Administrator's ruling.

Attached to the Administrator's brief are his letters written in August and October, 1943, expressing his views as of that date, with respect to requests from operators of United States Ordnance Depots, who then proposed to institute a two-platoon system for firemen; required to be on call for twenty-four hours. The Administrator excluded sleeping and eating time, and also time for personal affairs such as shaving, bathing, etc., and approved the requests.

The trouble with this evidence is that it orginiated four or five years subsequent to the transactions involved in the case at bar, and is not in sufficient detail to afford a comparison. The undertaking was a new one, and the rate of pay is not shown.

It is to be doubted that the Ordnance Depot Firemen are paid $325.00 a month, which would be the rate required, excluding penalties, under Petitioners' demands here.

CONCLUSION

The judgment should be affirmed, or if reversed, the case should be remanded for determination of defensive pleas, hours of work, application to the facts of the regular rate of pay, and a finding on attorney's fees.

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